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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

EPLUS GROUP, INC.,

Petitioner,

v.

CARESOUTH HOME HEALTH SERVICES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fourth Circuit created an intolerable conflict with decisions of the Eleventh[1] and Seventh[2] Circuits by ignoring the argument that a district court violates due process of law, when, *after* a case is tried, it raises *sua sponte* a fact intensive issue and proceeds to decide the case on the merits without giving the losing party an opportunity to introduce evidence relevant to the new issue.

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1. *Jefferson Fourteenth Ass. v. Wometco de Puerto Rico, Inc.*, 695 F.2d 524, 527 (11th Cir. 1983)

2. *Ricketts v. Midwest Nat'l Bank*, 874 F.2d 1177 (7th Cir. 1989).

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The petitioner is ePlus Group, inc. ("ePlus"), a wholly owned subsidiary of ePlus, inc., a publicly owned corporation.

Respondent, Caresouth Home Health Services, is the only other interested party to this proceeding.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceeding and Corporate Disclosure Statement	ii
Table of Contents	iii
Table of Cited Authorities	iv
Table of Appendices	vi
Opinions Below	1
Statement of Jurisdiction	1
Statement of the Case	1
Reasons for Granting the Petition	4
Conclusion	6

TABLE OF CITED AUTHORITIES

Page

Cases:

In re Edison Bros. Stores Co., 207 BR 801 (Bankr. D. Del. 1997) 2, 3

Garcia Enterprises, Inc. v. Enterprise Ford Tractor, Inc., 253 Va. 104, 480 S.E. 2d 497 (1997) 2

Jefferson Fourteenth Ass. v. Wometco de Puerto Rico, Inc., 695 F. 2d 524 (11th Cir. 1983) ..... i, 4

Ricketts v. Midwest Nat'l Bank, 874 F.2d 1177 (7th Cir. 1989) ..... i, 4

Statutes:

28 U.S.C. § 1254 1

28 U.S.C. § 1291 1

28 U.S.C. § 1332 1

Rule:

U.S. Supreme Court Rule 10(a) 4

Cited Authorities

Page

Other Authorities:

L. Flick, E. Huddleson & S. Whelan, *The Uniform Commercial Code Survey: Leases,* 54 Bus. Law 1855 (1999) 2

E. Huddleson, *Old Wine in New Bottles: Uniform Commercial Code Article 2A – Leases*, 39 Ala. L. Rev. 615 (1988) 2

R. Stern, E. Gressman, S. Shapiro, K. Geller, *Supreme Court Practice* (8th ed. 2002) 4, 5

Uniform Commercial Code § 1-201(37) 2

J.J. White & R.S. Summers, *Commercial Law Treatise* Ch. 30 (4th Ed. 1995) 2, 3

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Fourth Circuit Decided April 22, 2003 ..... 1a

Appendix B — Memorandum Opinion And Order Of The United States District Court For The Eastern District Of Virginia Dated And Filed June 10, 2002 ..... 7a

Appendix C — Order Of The United States Court Of Appeals For The Fourth Circuit Denying Petition For Rehearing Dated May 19, 2003 .... 59a

OPINIONS BELOW

The unpublished opinion of the Court of Appeals is dated April 22, 2003 and reproduced in Appendix A. The unpublished memorandum opinion and order of the district court dated June 10, 2002 is reproduced in Appendix B.

STATEMENT OF JURISDICTION

The judgment which this petition seeks to have reviewed was entered April 22, 2003. Petitioner timely filed a Petition for Rehearing *En Banc*. The Court of Appeals denied the Petition For Rehearing *En Banc* on May 19, 2003. (App. C)

This court has certiorari jurisdiction over this case under 28 U.S.C. § 1254. The court of appeals' jurisdiction was based on 28 U.S.C. § 1291, and the district court had jurisdiction over this case under 28 U.S.C. § 1332.

STATEMENT OF THE CASE

ePlus is an equipment leasing company. ePlus leased equipment which ePlus owned to respondent under several equipment schedules. When two of the equipment schedules ended, respondent attempted to exercise fair market value purchase options but did so late. On a third equipment schedule, respondent sought a one-month extension at expiration when the lease documents set the minimum extension at 3 months. ePlus sued for holdover rents. Respondent attempted to defend on the ground it had acquired title to some of the schedules from another party, EAB Leasing ("EAB"). EAB had, in error, given a deed to the equipment to respondent for no value, but, upon realizing

its error, EAB rescinded the deed. Respondent also contended that its errors in exercising purchase options were not material. Respondent introduced evidence that the fair market value of the equipment was zero, while ePlus contended this was irrelevant; having failed to meet contractual requirements to exercise its purchase options, respondent's choice was to either return the equipment or keep it and pay holdover rents in accordance with the lease terms. Caresouth counterclaimed for the return of holdover rents it had paid on other lease schedules.

The case was tried to Judge Cacheris on a stipulated record. The parties set forth the arguments noted above. Under certain circumstances, a document denominated as a lease can be recharacterized as a disguised security interest. *See Uniform Commercial Code* ("U.C.C.") § 1-201(37); *Garcia Enterprises, Inc. v. Enterprise Ford Tractor, Inc.*, 253 Va. 104, 480 S.E. 2d 497 (1997). *See generally*, E. Huddleson, *Old Wine in New Bottles: Uniform Commercial Code Article 2A – Leases*, 39 Ala. L. Rev. 615 (1988), J.J. White & R.S. Summers, *Commercial Law Treatise* Ch. 30 (4th Ed. 1995). This is a fact-intensive issue and the most litigated subject in leasing law. *Id. See also* L. Flick, E. Huddleson & S. Whelan, *The Uniform Commercial Code Survey: Leases*, 54 Bus. Law 1855, 1857 (1999). The current test is the so-called "economic reality" test under which the court determines whether, at the *outset* of the lease, the lessor retained a meaningful residual interest in the leased property. *Id. See generally*, *In re Edison Bros. Stores Co.*, 207 BR 801 (Bankr. D. Del. 1997). *Neither* party contended at the trial that the lease schedules in this case were disguised security interests, and, as a result, there was no evidence introduced by either side as to whether ePlus, as the lessor, understood at the outset of the leases, that it was or was not retaining a meaningful residual value in the leased property.

After six months, Judge Cacheris issued findings of fact and conclusions of law finding for respondent on all but one lease schedule. The basis of his decision was that he recharacterized the leases as disguised security interests. Judge Cacheris injected this issue into the case *sua sponte*, and, rather than allowing evidence on the point, he decided it against ePlus on the closed record. He reasoned (erroneously, according to the decided cases, *see Edison Bros. Stores*, *supra*), that he could "back into" ePlus' residual value reasoning at the start of the lease[1] from the fact that, by the end of the lease, the property had lost its value. Based on this reasoning and his condemnation of ePlus for what he called "sharp business practices," Judge Cacheris tortured the law to reach a result for respondent.

On appeal, ePlus raised as its primary issue the due process claim raised here. The appeal was heard by a Fourth Circuit Panel consisting of Judges Shedd, Traxler & Hamilton. After hearing extensive argument on the point of what evidence ePlus would have introduced on the true lease/ security interest issue, the court of appeals panel issued a *per curiam* decision merely stating it found no reversible error. The Fourth Circuit denied rehearing without request by any member of the court for a poll on rehearing *en banc*.

ePlus petitioned for rehearing *en banc* May 2, 2003. The court of appeals issued an order May 19, 2003 denying the petition.

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1. "Foresight, not hindsight, controls." 4 White & Summers, *supra*, § 30.3 at 24.

REASONS FOR GRANTING THE PETITION

The petition should be granted, because the court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter. Rule 10(a). ePlus realizes that there "must be a real or 'intolerable' conflict, not merely an inconsistency in dicta or in the general principles criticized." R. Stern, E. Gressman, S. Shapiro, K. Geller, Supreme Court Practice 225 (8th ed. 2002). ePlus believes the Fourth Circuit's decision is in intolerable conflict with the Eleventh Circuit and Seventh Circuit.

In *Jefferson Fourteenth Associates*, *supra*, the Eleventh Circuit held that, where a court acts *sua sponte* to reach decision without giving the affected party an "opportunity to develop the facts supporting its claim," the court violates the affected party's due process rights. In *Ricketts*, *supra*, the Seventh Circuit reached the same conclusion. Aside from due process considerations, the Seventh Circuit in *Ricketts*, *supra*, has noted several reasons why a notice and opportunity to respond requirement is a necessary predicate to dismissal which apply here, namely, that *sua sponte* decisions "may often conflict with the traditional adversarial precepts of our system of justice, and tend to make the district court seem like a proponent rather than an independent entity," *id.*, and that *sua sponte* action with no opportunity to respond "may prove wasteful of the court's limited resources rather than expeditious, for it often leads to a shuttling of lawsuits between the district and appellate courts." 874 F.2d at 1184 (citations omitted).

The Chief Justice has stated, "[t]here are really only two or three factors comprised in the certiorari decision – conflict

with other courts, importance and the perception that the decision is wrong in light of Supreme Court precedent." Chief Justice Rehnquist, The Supreme Court, How it was, How it is. 266 (1987), quoted in Stern, Gressman, Shapiro, Geller, *supra* at 258. In this case, the issue presented is of great public importance in the administration of jurisdiction of the district courts. It is intolerable to allow a trial court to decide, after trial, that it dislikes one side's position but cannot reach the desired result based on the law and to *sua sponte* raise a new issue to get to its result without allowing the loser to put in evidence. This is the worst kind of arbitrary decision-making.

The Fourth Circuit panel was obviously satisfied to let the result stand regardless of the legal errors and denial of an opportunity to be heard because the trial court sprinkled its opinion with many statements that ePlus was bad.

ePlus has no way of knowing what internal politics caused the Fourth Circuit panel to decide this case in such a strange manner, issuing an unpublished opinion without even addressing the crucial due process issue which ePlus raised at the first opportunity. Presumably, the unpublished nature of the opinion was an effort to evade review in the Fourth Circuit or here. In these days of online access to decisions, however, the district court's decision is readily available on Lexis, Westlaw and elsewhere and, unless *certiorari* is granted, will stand as a broad precedent. Accordingly there is no justification to refuse review to this case – which otherwise warrants review – because the panel marked the decision unpublished and said nothing on the crucial issues.

CONCLUSION

The writ should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED APRIL 22, 2003

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 02-1709

ePLUS GROUP, INCORPORATED,

Plaintiff-Appellant,

v.

CARESOUTH HOME HEALTH SERVICES,

Defendant-Appellee,

and

EAB LEASING CORPORATION; CENTRAL GEORGIA HEALTH SYSTEMS, INCORPORATED,

Defendants.

No. 02-1746

ePLUS GROUP, INCORPORATED,

Plaintiff-Appellee,

v.

Appendix A

CARESOUTH HOME HEALTH SERVICES,

Defendant-Appellant,

and

EAB LEASING CORPORATION; CENTRAL GEORGIA HEALTH SYSTEMS, INCORPORATED,

Defendants.

Appeals from the United States District Court
for the Eastern District of Virginia, at Alexandria.
James C. Cacheris, Senior District Judge.
(CA-01-286-A)

Argued: April 1, 2003

Decided: April 22, 2003

Before TRAXLER and SHEDD, Circuit Judges, and
HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

Appendix A

OPINION

PER CURIAM:

ePlus Group, Inc. (ePlus), a Virginia corporation, is an equipment lessor. In January 1997, ePlus and CareSouth Home Health Services, Inc. (CareSouth), a Georgia corporation, signed a "Master Lease." In 1997 and 1998, pursuant to the Master Lease, ePlus and CareSouth entered into eight schedules (Nos. 1, 3, 4, 100, 101, 102, 103, and 104), whereby ePlus leased various types of office/computer equipment to CareSouth.

In general, the Master Lease and schedules gave CareSouth three choices at the end of any lease: (1) it could give advanced written notice to terminate, in which case it had to return all leased assets by the last day of the lease term to a place designated by ePlus or else be a three month holdover tenant; (2) it could allow the lease term to extend by three months by not giving notice; or (3) it could buy the equipment at fair market value (except for Schedule 3, which provided no purchase option) provided it was not in default and gave timely written notice. With regard to Schedules 1, 3, and 4, the parties dispute whether CareSouth is liable for holdover rent. With regard to Schedules 4 and 100-104, the parties dispute whether CareSouth erroneously paid holdover rent.[1]

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1. With regard to Schedule 4, CareSouth paid one month of holdover rent, which it claims it is entitled to recover. ePlus claims CareSouth is liable for two additional months of holdover rent.

Appendix A

On February 22, 2001, ePlus filed a complaint in the United States District Court for the Eastern District of Virginia against CareSouth and Central Georgia Health Systems, Inc. (Central), which wholly owns CareSouth, alleging breach of contract against CareSouth and Central and further alleging estoppel against Central. In its complaint, ePlus sued EAB Leasing Corporation (EAB), an assignee of ePlus, contending EAB was liable if its claims against CareSouth and Central were unsuccessful.

On June 7, 2001, Central filed a motion to dismiss for lack of personal jurisdiction and for failure to state a claim. On June 22, 2001, the district court dismissed ePlus's complaint as to Central without prejudice.

On September 14, 2001, CareSouth filed a counterclaim against ePlus and a cross-claim against EAB. The cross-claim sought indemnification from EAB for any amount for which CareSouth was held liable to ePlus.

ePlus amended its complaint on September 28, 2001. The amended complaint contained the following causes of action: (1) breach of contract against CareSouth; (2) declaratory judgment against CareSouth; (3) interference with contractual relations against EAB; (4) inducing breach of contract against EAB; and (5) conversion against CareSouth.

On November 15, 2001, CareSouth filed an amended counterclaim against ePlus and restated its cross-claim against EAB. Essentially, the amended counterclaim contained four claims: (1) breach of contract; (2) setoff and

recoupment; (3) specific performance; and (4) injunctive relief. The restated cross-claim sought indemnification from EAB for any amount for which CareSouth was held liable to ePlus.

After completing discovery, the parties cross-moved for summary judgment. The district court denied all motions on January 4, 2002, except, by agreement of the parties, the district court enjoined ePlus from repossessing the leased assets in CareSouth's possession.[2]

The district court held a bench trial on January 10, 2002. The claims before the district court can be easily summarized: (1) ePlus's breach of contract claim against CareSouth for holdover rent on Schedules 1, 3, and 4; and (2) CareSouth's breach of contract counter-claim for the holdover rent it had paid on Schedules 4 and 100-104.

The case was heard, by agreement of the parties, on a detailed stipulation of facts supplemented by the depositions taken during discovery, the documents associated with the Master Lease and relevant schedules, and the affidavits submitted by CareSouth. The district court, in a fifty-three page opinion, held that CareSouth was not liable for the holdover rent payments it made with regard to Schedules 4 and 100-104 and further held that ePlus was entitled to holdover rent on Schedule 3, but not on Schedules 1 and 4. Accordingly, the district court entered judgment in favor of CareSouth on its breach of contract counterclaim in the

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2. The district court held in favor of EAB on all claims. EAB is not a party to this appeal.

amount of $130,644 (the amount CareSouth erroneously paid in holdover rent ($20,723.96 on Schedule 4; $83,045.76 on Schedule 100; $26,975.69 on Schedule 101; $2,219.40 on Schedule 102; $1,146.58 on Schedule 103; and $2,601.61 on Schedule 4) less the fair market value of the assets ($6,069)) and in favor of ePlus on its breach of contract claim under Schedule 3 in the amount of $1,435.36 per quarter plus prejudgment interest. The district court also ordered that CareSouth receive title to all of the leased assets in CareSouth's possession except the Schedule 3 assets. Finally, the district court ordered CareSouth to pay EAB and ePlus any unpaid late fees which accrued during the initial lease terms of the various schedules plus interest. ePlus appeals and CareSouth cross-appeals.

We have carefully reviewed the briefs, the record, and the arguments of counsel and find no reversible error. Accordingly, we affirm the district court's judgment.

AFFIRMED.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA DATED AND FILED JUNE 10, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 01-286-A

EPLUS GROUP, INC.,

Plaintiff,

v.

CARESOUTH HOME HEALTH SERVICES and
EAB LEASING CORP.,

Defendants.

MEMORANDUM OPINION

Plaintiff ePlus Group, Inc. ("ePlus") brought this action seeking, *inter alia*, relief for breach of contract against Defendant CareSouth Home Health Services ("CareSouth") involving a Master Lease Agreement (the "Master Lease") and eight separate equipment schedules governed by the terms of the Master Lease. After resolving a portion of ePlus's claims on summary judgment, the Court held a bench trial on January 11, 2002, regarding the remaining counts, as well as various cross-claims and counterclaims.

Appendix B

For the reasons set forth below, the Court will enter judgment in favor of CareSouth with respect Schedules 1, 4, 100, 101, 102, 103, and 104, and will enter judgment in favor of CareSouth with respect to its counterclaim against ePlus in the amount of $130,644.00. The Court will enter judgment in favor of ePlus with respect to Schedule 3 of the Master Lease, and will therefore order CareSouth to pay $1,435.36 per quarter in holdover rent, plus prejudgment interest, with respect to the Schedule 3 assets. The Court will further enter judgment in favor of EAB Leasing Corporation ("EAB") with respect to all claims against it.

I.

A. Factual Background

Plaintiff ePlus is a lessor of commercial equipment. It is a Virginia corporation with its principal place of business in Virginia. In early 1997, ePlus entered into a Master Lease with Defendant CareSouth Home Health Services, a wholly-owned subsidiary of Central Georgia Health Systems, Inc. ("Central"), whereby ePlus leased various types of office equipment to CareSouth.[1]

Following the execution of the Master Lease and delivery of the cubicles to CareSouth, ePlus assigned its right to receive lease payments during the initial term of the Master Lease to Marquette Bank ("Marquette"). Marquette also received a security interest in the cubicles covered by the Master Lease. Marquette then assigned all of its rights under the Master Lease

1. At the time the Master Lease was executed, ePlus was known as MLC Group, Inc. Defendant CareSouth is a Georgia corporation with its principal place of business in Georgia.

to EAB,[2] who thereafter acted as CareSouth's lessor with respect to the cubicles.

CareSouth contacted EAB on or about January 27, 2000, in order to inquire about exercising its purchase option with respect to the Schedule 1 equipment. Due to the fact that its computer system listed the transaction as a conditional sale, EAB issued a quitclaim bill of sale which transferred all of its rights with respect to the Schedule 1 equipment to CareSouth for the price of $1.00 on February 27, 2000.[3] CareSouth again contacted EAB on February 29, 2000, in order to make a similar purchase of the Schedule 3 equipment, which also had a negative market value.

The parties subsequently discovered that ePlus's assignment of the right to receive rental payments to Marquette, who then transferred it to EAB, had not included title to the assets, and that ePlus therefore retained residual ownership of the cubicles.[4] ePlus contacted CareSouth by letter on March 21, 2000, to notify it that ePlus retained ownership of the cubicles despite the quitclaim bills of sale issued by EAB, and that CareSouth would

2. EAB Leasing Corp. is a Pennsylvania corporation with its principal place of business outside of Virginia.

3. The uncontradicted evidence before the Court indicates that the office cubicles covered by Schedule 1 currently have a negative market value. In addition, it appears from the record that CareSouth never actually paid the $1.00 purchase price.

4. The parties' confusion was due in large part to ePlus's own actions, in that ePlus, in a July 23, 1997, letter to CareSouth, indicated that ownership of the assets had been transferred as part of the assignment.

need to contact ePlus regarding the disposition of the equipment covered by Schedules 1 and 3. EAB thereafter retracted the quitclaim bill of sale issued with respect to Schedule 1.

Hoping to purchase the assets covered by Schedules 1 and 3, CareSouth requested a buyout figure from ePlus. However, despite its considerable efforts, CareSouth has not, to date, been given a buyout figure or instructions regarding the return of the equipment by ePlus with respect to Schedules 1, 3, 100, 101, 102, 103, and 104.

ePlus now asserts a variety of claims against both CareSouth and EAB. Specifically, ePlus alleges that CareSouth failed to properly exercise the various purchase options, which allowed CareSouth to purchase the leased equipment for fair market value at the end of the initial lease term of each Schedule,[5] and, alternatively, failed to properly terminate each Schedule at the close of its initial term. ePlus therefore has taken the position that CareSouth is now a holdover tenant under the terms of the Master Lease and Schedules.[6]

B. Procedural History

On February 22, 2001, ePlus filed a complaint in this Court alleging breach of contract against CareSouth and Central, and further alleging estoppel against Central. On June 7, 2001, Central

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5. With the exception of Schedule 3, which contains no purchase option.

6. With the exception of the Schedule 4 assets, which have been returned, ePlus does, however, claim entitlement to additional rent with respect to the Schedule 4 assets.

filed a motion to dismiss for lack of personal jurisdiction and for failure to state a claim on which relief may be granted. On June 22, 2001, this Court dismissed ePlus's complaint as to Central without prejudice. The Court continued the case with respect to all other parties. On August 15, 2001, EAB dismissed its cross-claim against Central without prejudice pursuant to Rule 41(c) of the Federal Rules of Civil Procedure.

On September 14, 2001, CareSouth filed its counterclaim against ePlus, which it later amended, and an amended cross-claim (the "Amended Cross-Claim") against EAB. The Amended Cross-Claim sought indemnification from EAB for any amount for which CareSouth is held liable to ePlus. It also sought consequential damages and attorney's fees.

ePlus amended its complaint (the "Amended Complaint") on September 28, 2001. The Amended Complaint contains the following causes of action: (1) breach of contract against CareSouth; (2) declaratory judgment against CareSouth; (3) interference with contractual relations against EAB; (4) inducing breach of contract against EAB; and (5) conversion (pleaded in the alternative) against EAB.

CareSouth thereafter filed an amended counterclaim against ePlus and restated its cross-claim against EAB on November 15, 2001. The amended counterclaim contains four counts: (1) breach of contract; (2) setoff and recoupment; (3) specific performance; and (4) injunctive relief. The restated cross-claim sought indemnification from EAB for any amount for which CareSouth is held liable to ePlus. It also sought consequential damages and attorney's fees. Because jurisdiction is appropriate in this court pursuant to 28 U.S.C. § 1332, and because the

choice of law provision in the Master Lease requires the application of Virginia law, the Court will apply Virginia law with respect to all issues.

II. Findings of Fact

A. General

The Court hereby adopts as findings of fact all of the stipulations entered into by the parties as described in the Stipulations of Fact of Plaintiff ePlus Group, Inc. and Defendants CareSouth Home Health Services, Inc. and EAB Leasing Corp. (the "Joint Stipulations" or "JS").[7] Included among the Joint Stipulations are, *inter alia*, the following general facts:

(1) The Master Lease was executed by ePlus and CareSouth on or about January 22, 1997 (JS ¶ 1);

(2) Both parties subsequently executed Schedules 1, 3, 4, 100, 101, 102, 103, and 104 of the Master Lease (JS ¶ 4);

(3) The purchase options at issue were jointly negotiated by both parties, but were reduced to writing by ePlus (JS ¶ 5);

(4) CareSouth accepted possession of all assets at issue in this case (JS ¶ 6);

(5) ePlus assigned Schedules 1, 3, 4, and 101 to Marquette, who subsequently assigned them to EAB (JS ¶¶ 7-8); and

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7. For the sake of brevity, the Court will incorporate all stipulations by reference, and will not itemize each of them here.

(6) CareSouth was notified of these assignments in a July 23, 1997, letter (the "July 23 Letter") which was drafted by ePlus (JS ¶ 10).

B. Execution of, and Initial Payments Made Under, Schedules 1, 3, and 4.

Schedule 1, the initial lease term for which ended on January 31, 2000, was entered into by ePlus and CareSouth on or about January 22, 1997. (JS ¶¶ 17-18.) The "total cost value" of the assets covered under Schedule 1 was $246,689.95. (JS ¶ 19.) During the initial lease period, CareSouth paid a total of $273,464.60 in rent and taxes, including all rent and accompanying late charges incurred during the initial lease term of Schedule 1. (JS ¶¶ 20-21.) However, CareSouth was never billed for late fees which ePlus now claims it is owed with respect to Schedule 1. (JS ¶ 23.)

Schedule 3 was executed by ePlus and CareSouth on or about February 27, 1997, and the initial lease period ended on February 29, 2000. (JS ¶¶ 26, 29.) The total cost value of the assets covered by Schedule 3 was $16,938.92. (JS ¶ 27.) The last remaining rents and late fees due under the initial lease term for Schedule 3 were paid by CareSouth on April 26, 2000. (JS ¶ 30.) The late fees paid by CareSouth were assessed by EAB.[8] (JS ¶ 33.)

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8. CareSouth paid $436.02 on January 31, 2000, and $1,635.22 on April 26, 2000, in late fees. (JS ¶ 33.) As with Schedule 1, EAB now admits to overcharging CareSouth, and has therefore agreed to repay the overcharged amount. (JS ¶ 33.)

No purchase option was included in the terms of Schedule 3. (JS ¶ 34.) It is the position of CareSouth that the parties intended to include a purchase option in Schedule 3, but inadvertently failed to do so. (JS ¶ 34.) ePlus now seeks holdover rent in the amount of $11,626.88 ($1,453.36 per quarter for eight quarters), plus late fees. (JS ¶ 35.) CareSouth has presented uncontroverted evidence that the assets covered by Schedule 3 currently have no resale value. (JS ¶¶ 50-51.)

Schedule 4 was executed by CareSouth and ePlus on or about May 30, 1997, with its initial lease term scheduled to end on June 30, 2000. (JS ¶¶ 56-57.) The original cost value of the assets covered by Schedule 4 was $700,476.76. (JS ¶ 58.) During the course of the initial lease term, CareSouth paid a total of $791,158.63, which included taxes. (JS ¶ 59.) CareSouth also paid an additional $20,723.96 for one additional month's rent. (JS ¶ 59.)

C. Assignment and Attempted Termination of Schedules 1, 3, and 4.

With respect to Schedules 1, 3, and 4, ePlus notified CareSouth in July 1997 that it had made "an assignment of [its] rights in, but none of its obligations under, the Agreement *and the Assets thereunder* to Marquette National Bank." (Joint Exhibit (hereinafter "JE") 12.) (emphasis added). Although ePlus contends that it did not assign its ownership interest in the cubicles, the plain language of the July 23 Letter, which was drafted by ePlus and executed by all relevant parties, clearly indicates that rights to the assets were assigned to EAB. Furthermore, the July 23 Letter instructed CareSouth to make "all rental and other payments required to be paid by the Lessee"

directly to Marquette. (JE 12.) As the Court has already found, this letter was, at best, poorly drafted; at worst, it was patently misleading.[9] Moreover, this letter constituted CareSouth's only notification of the assignment, and it clearly indicated that title to the assets had been conveyed to EAB. Further, ePlus failed to inform CareSouth prior to March 2000 that it had retained an ownership interest in the assets covered by Schedules 1 through 4. (Scott Dep. at p.18, 1.20 - p.19, 1.12; p. 74 11.14-19; Cliff Dep. at p.17, 1. 16 - p. 18, 1.3; p.19 1.4 - p.20, 1.18.)

On January 31, 2000, CareSouth paid $4,233.20 to EAB for late fees assessed under Schedule 1.[10] (JS ¶ 24.) ePlus now seeks to recover holdover rent in the amount of $169,327.92 ($21,165.99 per quarter for eight quarters), plus additional late fees, from CareSouth in holdover rent incurred in connection with Schedule 1. (JS ¶ 25.)

Prior to receiving notice of ePlus's claim that it still retained title to the assets described in the July 23 Letter, CareSouth contacted EAB on or about January 27, 2000, to state that it

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9. Although ePlus employees claim to not understand the meaning of July 23 Letter (*see* Scott Dep. at p. 73, 1.5 - p. 74, 1.13; Cliff Dep. at p. 16, 1.11 - p. 17, 1.15), the Court finds the letter unambiguous as a matter of law. *See Tuomala v. Recent Univ.*, 252 Va. 368, 374, 477 S.E.2d 501, 505 (1996). In the alternative, the Court finds that any ambiguity which may exist must be construed against ePlus, the drafter of the document. *Galloway Corn. v. S.B. Ballard Constr. Co.*, 250 Va. 493, 505, 464 S.E.2d 349, 356 (1995).

10. It has since been learned that EAB overcharged CareSouth, and EAB has agreed to reimburse the overcharged amount to CareSouth. (JS ¶ 24.)

was interested in discussing its end of term options under Schedule 1. (JS ¶ 36.) EAB responded by sending a form to CareSouth, which CareSouth then returned indicating that it wished to exercise its purchase option for the equipment covered by Schedule 1. (JS ¶¶ 37-39.) Following its receipt of CareSouth's response, EAB issued a bill of sale for these assets. (JS ¶¶ 44-45.)

Despite the language of the July 23 Letter, ePlus notified EAB by letter on or about March 17, 2000, that it retained an ownership interest in the assigned assets. EAB subsequently retracted its bill of sale for the Schedule 1 equipment on or about March 21, 2000. (JS ¶ 49, JE 17.)

Just prior to this retraction, CareSouth contacted ePlus by fax to inquire about the schedules assigned to EAB. (JS ¶ 52.) This fax, and the telephone calls which followed, represent the first contact between CareSouth and ePlus regarding end of lease options for Schedules 1 and 3. (JS ¶ 53.)

CareSouth has presented uncontroverted evidence that the assets covered by Schedule 1 currently have no resale value.[11] (JS ¶¶ 50-51.) ePlus has never requested that the assets covered by Schedules 1 and 3 be returned to it, and the record is entirely devoid of any evidence which would indicate that ePlus attempted to amicably resolve a problem caused in part by its own actions.

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11. The cubicles covered by Schedules 1 and 3 are between eight and ten years old. In addition, some of them had previously been remanufactured and are in "fair to poor" condition. (Wilkes Dep. at p. 9, 1.24 - p. 16 1.8.)

Appendix B

CareSouth has refused to pay any rent for the assets covered by Schedules 1 and 3 beyond that due under the initial lease term. (JS ¶ 54.) CareSouth contacted ePlus by fax on March 17, 2000, to determine whether any payments were owed to ePlus in light of the assignment of the various schedules to EAB. (JE 36.) This fax was followed by additional calls from CareSouth employees who attempted to ascertain ePlus's position with respect to the assets.[12] Despite these numerous contacts, ePlus failed to provide CareSouth with a proposed buyout figure. (Scott Dep. at p. 61, 11. 18-21; p. 64, 1.20 - p. 65, 1.10.) Indeed, ePlus never provided a buyout price to CareSouth with respect to any of the schedules involved in this litigation. (Cliff Dep. at . p.28, 1.19 - p. 29, 1.19; p. 88, 1.8 - p. 89, 1.12.) Rather, ePlus simply contacted CareSouth on or about July 5, 2000, in order to notify CareSouth in writing that ePlus believed that it was a holdover tenant under Section 12 of the Master Lease with respect to the assets covered by Schedules 1 and 3.[13] (JS ¶ 55.)

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12. The court notes that CareSouth went to great lengths to accommodate and work with ePlus to resolve this situation amicably. At one point, Caresouth even offered to purchase the equipment for approximately $20,000. (MacInnis Dep. at p. 10, 1.18 - p. 11, 1.23; Southern Dep. at p. 22, 1.22 -p. 23, 1.21.) This was done in good faith, despite the fact that the cubicles had no market value and that EAB, believing that it owned them, had been willing to sell them for a minimal amount.

13. Section 12 of the Master Lease states, in pertinent part, that "[o]n the last day of the Schedule Term, Lessee shall return the Asset(s) to Lessor in good repair, condition and working order, ordinary wear and tear alone excepted, to the location specified by Lessor."

Appendix B

Turning now to Schedule 4, the Court finds that CareSouth first contacted ePlus about exercising its purchase option for the Schedule 4 assets on February 8, 2000. (JS ¶ 60.) ePlus failed to respond to this inquiry. (JS ¶ 60.) CareSouth again contacted ePlus regarding this matter on March 8, 2000. (JS ¶ 61.) Again, however, ePlus failed to respond to CareSouth's inquiry. (JS ¶ 61.)

CareSouth contacted ePlus yet again on March 15, 2000. (JS ¶ 62.) This time, however, CareSouth indicated that it no longer wished to exercise its option to purchase the Schedule 4 assets. (JS ¶ 62.) Rather, it desired to return the assets to ePlus on May 31, 2000, which it believed to be the close of the initial lease term. (JS ¶ 62.) Again, ePlus failed to respond to this letter. (JS ¶ 63.) ePlus has offered no explanation whatsoever for its failure to respond to any of CareSouth's inquiries regarding the termination of this schedule. (Currao Dep. at pp. 16-17; Scott Dep. at p. 30, 11. 3-19; p. 36, 11.12-17; Lane Dep. at p. 56, 1.17 - p. 57, 1.4; Cliff Dep. at p. 44, 11.2-12.) In addition, its own employee freely admits that it should have done so. (Cliff Dep. at p. 50, 11.6-13.)

CareSouth sent a final letter to ePlus on or about May 31, 2000. (JS ¶ 64.) ePlus finally did respond to this letter on July 5, 2000, following the expiration of the initial lease term. (JS ¶ 65.)[14] In addition, ePlus refused to allow CareSouth to return any of the assets in question without its permission and instructions regarding such return. It then refused to provide such

14. ePlus has subsequently acknowledged that its unwillingness to allow CareSouth to extend the lease term by one month should have been promptly communicated to CareSouth. (Lane Dep. at p. 58, 11.9-13.)

instructions despite repeated requests from CareSouth. According to ePlus, CareSouth could not return the assets in question until it agreed to pay additional holdover rent. (Lane Dep. p. 67 1.6 - p. 68, 1.21; Scott Dep. p. 36 11.12-17.)

CareSouth responded to ePlus's July 5 letter in a July 11 letter in which CareSouth stated that, because proper notice had been given under the terms of the lease, it was not a holdover tenant and would not pay any additional payments. (JE 9.) The letter again requested return instructions for the Schedule 4 assets. (JE 9.) ePlus responded with a July 21 letter, which reiterated its belief that CareSouth was a holdover tenant and again stated that CareSouth must pay an additional three months' rent before it would be permitted to return the Schedule 4 assets. (Scott Dep. at p. 52, 1.12 - p. 53, 1.15.)

ePlus ultimately changed its position and provided instructions to CareSouth regarding the return of the Schedule 4 assets on or about July 28, 2000. (JS ¶ 66.) Pursuant to these instructions, CareSouth returned the Schedule 4 assets in late July or early August 2000.[15] (JS ¶ 67.) CareSouth paid the rent due on these assets for the month of July. (JS ¶ 68.) Despite having received this payment, as well as having received and resold the assets, ePlus now seeks holdover rent for the months of August and September as well.[16] (JS ¶ 70.)

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15. The equipment was then sold to a third party for approximately $16,000. (JE 37.)

16. Specifically, ePlus seeks a total of $38,736.18 ($19,368.18 per month for two months), plus late fees. (JS ¶ 70.)

Appendix B

D. Schedules 100-104

Schedule 100 was assigned to Community First Federal ("Community First"), and its initial lease term terminated on July 31, 2000. (JS ¶ 73.) Under the terms of the assignment, CareSouth paid rent to Community First. CareSouth notified ePlus of its desire to exercise its purchase option for the assets covered by this schedule on March 28, 2000. (JS ¶ 74.) CareSouth had not paid the rental payment due on February 1, 2000, at the time it notified ePlus that it wanted to exercise the purchase option, but subsequently paid the amount owing under the lease on April 10, 2000. (JS ¶¶ 75-76.) CareSouth thereafter made the additional late rental payments described in JE 33, but has not paid any late fees associated with the late rental payments because neither ePlus nor Community First billed CareSouth for such fees. (JS ¶¶ 77-79.) As described in JE 33 and JE 48, CareSouth paid rent and taxes for Schedule 100 beyond those due under the initial lease term. (JS ¶ 80.)

Schedule 101 was assigned to EAB, and its initial term ended on October 31, 2000. (JS ¶ 81.) On July 12, 2000, CareSouth notified ePlus of its intent to purchase the Schedule 101 assets. (JS ¶ 82.) CareSouth made its May 1, 2000, rent payment on May 24, 2000, but has not been billed for any late fees by either ePlus or EAB.[17] (JS ¶¶ 83-84.) As described in JE 33 and JE 48, CareSouth has continued to make rental and tax payments due under this schedule beyond those due under the initial lease term. (JS ¶ 85.)

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17. However, CareSouth admits that it was notified by EAB that it was in arrears. (JS ¶ 84.)

Appendix B

The initial lease term for Schedule 103 was set to expire on April 30, 2001. (JS ¶ 90.) On March 28, 2000, CareSouth notified ePlus of its intent to purchase the Schedule 103 assets. (JS ¶ 91.) CareSouth's February 1, 2000, rent payment was made on February 14, 2000. (JS ¶ 92.) Neither ePlus nor EAB has billed CareSouth for any late fees incurred under this Schedule. (JS ¶ 93.) As described in JE 33 and JE 48, CareSouth has made rental and tax payments under this schedule.

In sum, CareSouth gave timely notice of its intent to exercise its purchase options under Schedules 100, 101, and 103. (JE 23-24.) ePlus responded on July 25, 2000, stating that it would not provide buyout figures on these schedules "until all of the outstanding issues concerning all of [CareSouth's] matured schedules have been corrected." (JE 41.) As ePlus has itself acknowledged, this letter fails to specify the requirements CareSouth must meet in order to resolve these "outstanding issues." (Lane Dep. at p. 63, 11. 11-21.) Indeed, the author of the letter has admitted that he does not know what these issues are. (Lane Dep. at p. 64, 11. 4-8.) As late as July 2000, his supervisor, Ms. Cliff, was also unable to articulate what outstanding issues prevented CareSouth from being able to exercise the purchase options for which it had negotiated. (Cliff Dep. at p. 68, 1.12.)

In light of ePlus's oral and written representations, described above, CareSouth never provided written notice of its intent to purchase the assets covered by Schedule 102, which ended on January 31, 2001. (JS ¶¶ 86-88.) As described in JE 33 and JE 48, CareSouth continued to make rental and tax payments on Schedule 102 beyond those required by the initial lease term. (JS ¶ 89.) The initial lease period for Schedule 102 terminated on January 31, 2001.

For the reasons described above, CareSouth also has not notified ePlus in writing of its intent to purchase the Schedule 104 assets. (JS ¶ 97.) The initial lease term for Schedule 104 ended on July 31, 2001. (JS ¶¶ 96-98.) As described in JE 33 and JE 48, CareSouth has continued making rental and tax payments due under this Schedule. The uncontested combined value of the assets covered by Schedules 100 through 104 is $6,068. (JE 42.)

Finally, ePlus drafted the Master Lease and all of the Schedules relevant to this litigation. The terms of these agreements were so poorly drafted that ePlus's own employees could not determine end dates under some of the schedules, and ePlus never communicated to CareSouth the dates on which it believed the initial terms of the various schedules came to a close (as determined by its computer program which calculates the end dates for the various lease terms). (Scott Dep. at p. 24, 1.21 - p. 27, 1.11; Lane Dep. at p. 53, 1.1 - p. 55, 1.19; p. 57, 11.5-11.)[18]

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18. Indeed, ePlus employees could not even agree on what type of event marked the commencement of a lease term. Examples of the testimony of its employees include the following:

> Counsel: What does [the lease language] mean to you?
>
> Mr. Lane: That the lease will commence for each asset from the date and an additional 36 months after the commencement date.
>
> Counsel: Well, is the commencement date a defined term? What is the commencement date?

(Cont'd)

Appendix B

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Mr. Lane: The commencement date would be the date the lease was signed and executed and started.

Counsel: So is that May 30, 1997? I see that date under Ron Conners' signature.

Mr. Lane: That looks to be correct.

Counsel: It would be that date instead of May 14, 1997, the first line of the document?

Mr. Lane: That was my error. The commencement date would be May 14, 1997.

Counsel: So the commencement date has nothing to do with the date of delivery and certificate of acceptance which would be on page 19, June 2, 1997, correct?

Mr. Lane: Could you repeat that?

Counsel: You have now told me that the commencement date is May 14. So I am calling your attention to page 19, certificate of acceptance, and asking for you to confirm for me that the date of acceptance, June 2, 1997, has nothing to do with the commencement date. You told me it is May 14, so it is obviously not June 2, the date of acceptance; is that correct?

Mr. Lane: I don't know.

Counsel: You don't know whether it is the date of Ron Connors' signature, May 30, or the date on the top of

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Appendix B

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the schedule, May 14, or June 2, 1997; is that correct?

Mr. Lane: The date of acceptance is June 2, 1997. Mr. Conners signed the document on 5/30/97, and I am saying the schedule started May 14, 1997.

Counsel: Is it your testimony that the commencement date, as that term is used in capital letters on the schedule, is May 14, 1997?

Mr. Lane: I don't know.

(Lane Dep. at p. 53, l.19 - p. 55, l.14)

Counsel: Can you tell me . . . when did the original lease term expire with respect to Schedule 4?

Ms. Scott: I don't know.

Counsel: You are looking at the schedule itself, correct?

Ms. Scott: At the schedule documents, according to Bates number 15. It does not indicate what the specific end date of that lease is.

Counsel: What would one have to look at to know what the end date of the lease is?

Ms. Scott: I normally go by a computer program that we use which indicates the maturity date of the lease schedule.

Counsel: So you have a computer program that tells you, that tells it the termination of this schedule?

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Appendix B

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Ms. Scott: Per the contract, item number 1, under initial lease term. So the commencement date for each asset, that the lease term lasts 36 months thereafter.

Counsel: And is the commencement date defined in this document?

Ms. Scott: There is a certificate of acceptance.

Ms. Scott: The start date would be from when the customer would begin making their payments. I don't know what specific documents would indicate the initial start date of the lease. I know it has some correlation to the acceptance certificate.

Counsel: Can you tell me what that correlation is – and I am not trying to be cute, but looking at the schedule itself, it is not readily apparent what the end of this schedule is, when the 36 months runs, and, of course, the correspondence uses different dates in different correspondence. So is there a definition of commencement date or anywhere, to your knowledge, where it indicates how the certificate of acceptance correlates to the commencement date?

Ms. Scott: Not to my knowledge.

Counsel: So what you have to rely on for your purposes is looking at a computer program you all keep internally, correct?

Ms. Scott: Yes.

(Scott Dep. at p. 24, l.21 - p. 27, l.11)

Appendix B

III. Conclusions of Law

A. Overview

As a preliminary matter, the Court notes that ePlus unquestionably created the situation of which it complains, and from which it now seeks relief. From the outset of its relationship with CareSouth, ePlus's communications, when it has bothered to communicate at all, have been confusing, vague, and, sometimes, patently misleading.

Rather than attempting to rectify a situation it contributed to by falsely representing to CareSouth that title to some of the assets at issue had been assigned to EAB, ePlus has sought to take advantage of this situation. It has adopted tortured, varying, and overly technical interpretations of various lease provisions, and has refused to conduct business with CareSouth under the remaining schedules, electing instead to tie up all three parties in protracted litigation over office equipment that has little market value, and which ePlus itself has expressed no desire to either sell or repossess.[19]

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19. ePlus's behavior is perhaps best illustrated by its continuously changing justifications for its actions. That is, ePlus first claimed that the purchase options at issue in this litigation could not be exercised because notice had incorrectly been provided to EAB rather than ePlus, despite the fact that ePlus informed CareSouth via the July 23 Letter that title to the assets covered by Schedules 1 and 3 had been assigned to EAB. (Scott Dep. at p. 62, 1.10 - p. 63, 1.8; Cliff Dep. at p. 30, 11. 5-15.) It then took the position that Caresouth would not be permitted to exercise the purchase options on the remaining schedules until it had made the disputed payments

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Indeed, the totality of the evidence before it leads the Court to the inescapable conclusion that ePlus's primary goal in its dealings with CareSouth was to place CareSouth in the position of holdover tenant with respect to the various schedules, thereby enabling it to retain title to the assets at issue. Although these assets have little resale value in the sense that their economically useful life has essentially ended, ePlus has attempted to leverage them in order to extract hundreds of thousands of dollars in additional payments from CareSouth.[20]

The Court has carefully reviewed the findings of fact noted above and the record as submitted. For the reasons stated below,

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ePlus claimed it was owed on earlier schedules, but nevertheless refused to delineate what steps Caresouth would be required to take in order to rectify these unresolved issues. (MacInnis Dep. at p. 20, l. 25 - p. 21, l.8; p. 23, l.24 - p. 25, l.1; p. 27, ll.6-12; p. 32, ll.3-13; Lane Dep. at p. 74, l.17 - p.75, l.1.) Next, ePlus asserted during the course of this litigation that it would be impossible for CareSouth to ever exercise these purchase options, as it believed the terms of the Master Lease required perfect performance throughout the course of the lease term as a condition precedent to the exercise of such options. Finally, at the summary judgment stage of these proceedings, ePlus alleged that CareSouth was prohibited from exercising the purchase options for which it had negotiated because it owed late fees on several of the schedules, despite the fact that neither it nor EAB ever billed CareSouth for such fees as had been the custom of the parties.

20. As ePlus has admitted, given the terms of its relationship with CareSouth, it is to its advantage to continue to treat CareSouth as a holdover tenant rather than allowing it to exercise the purchase options. (Lane Dep. at p. 39, ll.12-21.)

the Court concludes that CareSouth is entitled to have judgment entered on its behalf with respect to Schedules 1, 4, 100, 101, 102, 103, and 104. As set forth more fully in the following subsections, the Court has analyzed the facts of this case under a number of separate and independent doctrines, all of which lead it to this same conclusion.

B. Article 9 of the Uniform Commercial Code[21]

(1) Schedules 1 and 4

First, although not cited or argued by the parties, the Court holds that the Supreme Court of Virginia's decision in *C.F. Garcia Enterprises, Inc. v. Enterprise Ford Tractor, Inc.*, 253 Va. 104, 480 S.E.2d 497 (1997), is controlling in this case. In *Garcia Enterprises*, the parties entered into an "Equipment Lease Agreement" for the lease of a backhoe. 253 Va. at 106, 480 S.E.2d at 498. Under the terms of the contract, the lessee was granted the option to purchase the backhoe for $1 at the close of the lease period provided that it timely informed the lessor in writing of its intent to do so. *Id.* The contract also contained a default provision allowing the lessor to repossess the equipment in the event that the lessee was delinquent in making its monthly payments. *Id.*

As in this case, the lessee in *Garcia Enterprises* was late in making several of the periodic payments due under the terms of

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21. The Court notes that a revised version of Article 9 took effect in Virginia on July 1, 2001. Because the Master Lease and Schedules at issue in this litigation were executed well before this date, the Court need not address whether the 2001 revisions affect the outcome of this case.

the lease. *Id.* Also, as in this case, the lessee in *Garcia Enterprises* failed to timely inform the lessor of its intent to exercise its purchase option, and similarly failed to pay the $1 purchase price called for by the purchase option. *Id.* The lessor therefore repossessed the backhoe and sold it, prompting the lessee to file suit against the lessor. *Id.* The trial court entered summary judgment in favor of the lessor. *Id.*

On appeal, the Supreme Court of Virginia reversed the trial court, holding that the lease at issue constituted a security agreement under Article 9 of the Uniform Commercial Code ("U.C.C."). 253 Va. at 107, 480 S.E.2d at 499. Article 9, the Court held, "governs any transaction, 'regardless of its form,' which is intended to create a security interest in personal property." *Id.* (quoting Va. Code § 8.9-102). In reaching this conclusion, the Supreme Court first analyzed the statutory definition of "security interest":

> Whether a lease is intended as security is to be determined by the facts of each case; however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property *for no additional consideration or for a nominal consideration does make the lease one intended for security.*

Id. (quoting Va. Code § 8.1-201(37) (emphasis added in *Garcia Enterprises* opinion). In light of this definition, the Court held that "[t]he plain language of the statute creates a security interest in property as a matter of law if the parties' contract allows the lessee to become the owner of the leased property for nominal

or no additional consideration upon compliance with the terms of the lease." *Id.* Such statutory language, in turn, "is based on the rationale that when the terms of the 'lease' and option to purchase are such that the only sensible course of action for the `lessee' at the end of the term is to exercise that option and become the owner of the property, the 'lease' becomes one intended to create a security interest under Code § 8.1-201(37)." 253 Va. at 108, 480 S.E.2d at 499. Accordingly, "[i]f a contract contains such an option, the agreement is conclusively presumed to be one intended as security, without reference to other facts from which the opposite conclusion might be drawn." *Id.* The Supreme Court therefore concluded as a matter of law that the lease at issue in *Garcia Enterprises* "was a security agreement because it provided [the lessee] the option to purchase the backhoe for nominal consideration upon compliance with the terms of the agreement." *Id.*

In addition, the Supreme Court further held that the lessee's various breaches of the terms of the lease did not disqualify it from being able to exercise the purchase option. 253 Va. at 109, 480 S.E.2d at 500. Rather, the Court held that "[a] breach of contract does not necessarily constitute a default under a security agreement," and that "[the lessee's] failure to notify [the lessor] of its intent to 'purchase' the backhoe or to tender $1 did not affect [the lessor's] right to receive payment for the backhoe." *Id.* It therefore concluded that "[the lessee's] contract breach in failing to notify [the lessor] and to pay $1 did not constitute a default nor affect [the lessor's ownership interest in the backhoe." *Id.* Accordingly, "[w]hile [the lessee's] failure to make timely payments constituted a default under the security agreement, this default d[id] not bar [the lessee's] right to recover damages" for the repossession. *Id.*

Appendix B

As a preliminary matter, the Court notes that it is well settled that the issue of whether a particular transaction constitutes a lease, as opposed to a security instrument, is a question of fact to be determined by the fact-finder based on the particular circumstances presented by each individual case. *See In re Rex Group, Inc.*, 80 B.R. 774, 780 (Bankr. E.D. Va. 1987); *In re Dunn Bros., Inc.*, 16 B. R. 42, 45 (Bankr. W. D. Va. 1981) (citing *Weiskotten v. Goforth Tractor, Inc.*, 1 B.R. 231, 233 (Bankr. W.D. Va. 1979)); *see also Gibson County Farm Bureau Coop. Assoc., Inc. v. Greer*, 643 N.E.2d 313, 320 & n.10 (Ind. 1994) (citing cases); *Granite Equip. Leasing Corp. v. Acme Pump Co., Inc.*, 335 A.2d 294, 296 (Conn. 1973). In addition, the Court notes that the language of Va. Code § 8.1-201(37), as quoted above, is determinative in this case. Specifically, the Court notes that other courts, in interpreting this provision of the U.C.C., have held that the statutory language results in a conclusive presumption in favor of a finding of a security agreement in situations in which the contract at issue contains an option to purchase the assets for nominal consideration, or in situations in which the only sensible alternative for the party in possession of the assets at the end of the lease is to exercise its purchase option. Put simply, these courts have concluded that subsection (b), which provides that an agreement constitutes a security interest if the lessee has the option to purchase the assets for a nominal amount at the close of the lease period, establishes a threshold inquiry; if this requirement is satisfied, then a security agreement exists as a matter of law and a court need not inquire further. *See, e.g., In re J.A. Thompson & Son, Inc.*, 665 F.2d 941, 946-47 (9th Cir. 1982) (holding that "subsection (b) provides an exception to the general rule, whereby one fact in a given case takes on determinative significance. Thus, if a lease contains an option to purchase 'for

no additional consideration or for nominal consideration,' it is conclusively presumed to be 'intended as security,' without reference to other facts from which the opposite inference might be drawn.") (cited in *Garcia Enterprises*, 253 Va. at 108, 480 S.E.2d at 499); In re Marhoefer Packing, Co., Inc., 674 F. 2d 1139, 1142 n.2 (7th Cir. 1982) (noting that, "upon careful reading of the entire section it is clear that the first question to be answered is that posed by clause (b) – whether the lessee may obtain the property for no additional consideration or for a nominal consideration. If so, the lease is intended for security. If not, it is then necessary to determine 'by the facts of each case' whether . . . the fact that the lease contains an option to purchase 'does not (of itself) make the lease one intended for security.'") (citation omitted) (cited in Garcia Enterprises, 253 Va. at 108, 480 S.E.2d at 499); *Commercial Credit Equip. Corp. v. Parsons*, 820 S.W.2d 315, 319 (Mo. Ct. App. 1991) ("If the agreement provides that the lessee may become the owner of the property for no additional consideration or for nominal consideration, then, presumptively, the lease is intended for security. If not, then, whether the lease is intended for security, is to be determined by the facts of each case.") (citation and internal quotations omitted) (cited in *Garcia Enterprises*, 253 Va. at 108, 480 S.E.2d at 499); Dunn Bros., 16 B.R. at 45 ("A lease with a provision for the lessee to become, or to have an option to become, the owner of the property at the end of the lease period for no additional consideration, or for nominal consideration, is . . . a security agreement by statute.").

Accordingly, the Court turns first to the issue of whether the agreement at issue satisfies the requirements of Va. Code § 8.01-201(37)(b), which, as stated above, conclusively presumes the existence of a security instrument where the lessee,

at the close of the lease term, has the option to purchase the assets covered by the lease for nominal consideration. *See Garcia Enterprises*, 253 Va. at 107, 480 S.E.2d at 499. In determining what constitutes "nominal" consideration, the Court turns first to the current version of § 8.1-201(37). Although this provision was not in effect at the time the Master Lease and Schedules were executed, and is therefore not binding in this situation, the Court finds it appropriate to look to the statute for guidance in determining whether the purchase options at issue represent only nominal consideration, and therefore create Article 9 security agreements as a matter of law.

A problem arises, however, because the current statute offers conflicting standards on this issue. First, it states in subpart 4(a)(ii) that "[a]dditional consideration *is not* nominal if . . . when the option to become the owner of the goods is granted to the lessee the price is stated to be the fair market value of the goods determined at the time the option is to be performed." (emphasis added). This statement clearly militates in favor of a finding that the consideration in this case was not nominal. However, in the very next sentence, subpart 4(a)(ii) states that "[a]dditional consideration *is* nominal if it is less than the lessee's reasonably predictable cost of performing under the lease agreement if the option is not exercised." (emphasis added).

The rigid application of either of these standards would obviously point the Court toward fundamentally different conclusions. In weighing this dilemma, the Court finds the latter more directly applicable to the facts before it. Indeed, this second standard goes directly to the heart of the issue in this case, as the amount sought by ePlus in this litigation is, by definition, "the reasonably predictable cost of performing under the lease

agreement if the option is not exercised." Furthermore, the Court finds that this statement hews more closely to case law that existed at the time the parties executed the documents at issue in the sense that such cases focused on the economic reality of a given situation rather than subscribing to a bright line rule regarding the form of the purchase option in dispute. *See Garcia Enterprises*, 253 Va. at 108, 480 S.E.2d at 499 (noting that the version of the statute in existence at the time the Master Lease and Schedules were executed was "based on the rationale that when the terms of the 'lease' and option to purchase are such that the only sensible course of action for the 'lessee' at the end of the term is to exercise that option and become the owner of the property, the 'lease' becomes one intended to create a security interest under § 8.1-201(37)").[22] As described in a previous Virginia case,

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22. Furthermore, this position is consistent not only with that taken by the Fourth Circuit, but also with recent rulings by courts in other jurisdictions as well. *See, e.g., In re Merritt Dredging Co., Inc.*, 839 F.2d 203, 209 (4th Cir. 1988) (holding that the parties' characterization of a document as a lease "is not controlling", and noting that courts should therefore "look to the true relationships and economic realities created by the agreement to determine the interests conveyed by it") (citation and internal quotations omitted); *In re Beckham*, 275 B.R. 598, 601 (D. Kan. 2002) (applying standards that "focus on economic realities rather than on the parties' subjective intent or the labels placed upon the agreement"); *PSINet, Inc. v. Cisco Systems Capital Corp.*, 271 B.R. 1, 43 (S.D.N.Y. 2001) (holding that, "[u]nder California law, the determination of whether an agreement creates a true lease, on the one hand, or a security interest, on the other, is dependent on the economics of the transaction, and not the intent of the parties"); *In re Smith*, 259 B.R. 561, 565-66 (D.S.C. 2000) (following the Fourth Circuit's decision in *Merritt Dredging* by looking to the economic realities of the transaction).

Appendix B

> The definition of a "nominal consideration may vary, but the best formula for determining whether a lessee may purchase leased property for a "nominal" sum has been described as the "economic realities" test. J. White & R. Summers, *Uniform Commercial Code*, § 22-3 at 881 (2d ed. 1980). If at the end of the term, the only economically sensible course for the lessee is to exercise the option to purchase the property, then the agreement is a security agreement. *Id.*

Dunn Bros., 16 B.R. at 44. Here, there can be little doubt that the only sensible alternative for CareSouth was the one it did in fact choose: to exercise the purchase options for which it had negotiated, thereby acquiring full title to the assets at a fraction of what it would cost to continue leasing them from ePlus.[23] Indeed, in its zeal to purchase the assets, CareSouth even went as far as attempting to exercise a non-existent purchase option with respect to the Schedule 3 assets. It was only when met with

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23. For example, the total cost value of the assets at issue with respect to Schedule 1 was $246,689.95. (JS ¶ 19.) Caresouth, during the course of the initial lease period, paid a total of $273,464.60 in rent and taxes. (JS ¶¶ 20-21.) The uncontested evidence before the Court demonstrates that the assets covered by Schedule 1 have a negative market value, and that the purchase option therefore entitled CareSouth to acquire the assets at the price of no more than one dollar. By contrast, ePlus now seeks quarterly rent for the Schedule 1 assets in the amount of $21,165.99, plus tax. (JS ¶ 25.) Accordingly, the Court therefore concludes that (1) the only sensible option for CareSouth was to exercise the purchase option for which it had negotiated; (2) Schedule 1 therefore contains an option to purchase for nominal value; and (3) that it therefore unquestionably qualifies as a security instrument.

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stonewalling and course dealing on the part of ePlus that CareSouth did not exercise its purchase options, as in the case of Schedules 4 (where it ultimately returned the assets), and 102 and 104 (where ePlus had communicated to CareSouth that it had no intention of honoring the purchase options for which CareSouth had negotiated).

Furthermore, the Court finds that both parties, and ePlus in particular, are sophisticated entities. The Court therefore concludes that, in setting the market value at the close of the lease term as the purchase price for the purchase option, both had reasonably accurate expectations of what the approximate value of the covered assets would be at the close of the respective lease terms. Put simply, the Court finds that both parties knew

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(Cont'd)

With respect to Schedule 4, the Court notes that the assets covered by it had an original cost value of $700,476.76. (JS ¶ 58.) The total amount paid by CareSouth under the initial lease term, including taxes, was $791,158.63. Following the return of the assets by CareSouth, ePlus sold them to another company for $16,000. (JE 37.) As other courts have noted, "an option price may be more than a few dollars and still be considered nominal within the meaning of section 1-201(37)." *Marhoefer Packing Co.*, 674 F. 2d at 1144. Indeed, prices of several thousand dollars have been held to be nominal for purposes of this section. *See id.* (citing cases in which option prices in the amount of $1,253.71, $8,040, and $47,000 have been held to be nominal). Here, in light of the fact that (1) CareSouth had already paid more than the original cost value; (2) that the assets were sold for less than three percent of their original value; (3) that the monthly rate requested by ePlus was $19,368.18 (plus tax); and (4) that CareSouth could therefore have acquired the Schedule 4 assets for less than one additional month's rent, the Court finds that Schedule 4 purchase option also involves minimal consideration, and that it therefore creates a security agreement as a matter of law.

that the lease terms would cover the economically useful life of the assets and that, by selecting market value as the purchase price, CareSouth would be required to pay only a nominal amount at the close of each lease term in order to exercise the respective purchase options. Accordingly, the Court finds that the additional consideration required to exercise the purchase options at issue in this case was "nominal."

In the alternative, the Court also finds that, even if the Master Lease and schedules fail to satisfy the requirements of § 8.1-201(37) (b), a close analysis of the facts of this case leads to the conclusion that the parties intended to create a security agreement, and that they therefore meet the secondary test as well. That is, the Court, in reviewing the evidence before it, finds the facts at issue in this case to be remarkably similar to those in *Garcia Enterprises*. In this case, as in *Garcia Enterprises*, the Master Lease and Schedules were clearly intended to create a security interest in the covered assets. Put simply, CareSouth, in reaching its agreement with ePlus, bargained not only for the use of the equipment, but also for the right to purchase it for nominal consideration at the end of the lease period. As in *Garcia Enterprises*, "the only sensible course of action for [CareSouth] at the end of the term [wa]s to exercise that option and become the owner of the property." 253 Va. at 108, 480 S.E.2d at 499.

The Court, in reaching this conclusion, is aware that there is evidence to the contrary. Specifically, the Court notes (1) that the operative document is titled "Master Lease Agreement"; (2) that the Master Lease contains boiler-plate language stating that "Lessee shall have no right, title or interest in the Asset(s)," *see* Master Lease at ¶ 8(a); and (3) that an "'original' counterpart" of a schedule incorporating the Master Lease is required for

purposes of satisfying the filing requirements necessary to create a formal security interest. *See* Master Lease ¶ 18(c). However, such facts are not determinative with respect to this issue. *See Commercial Credit Equip. Corp.*, 820 S.W.2d at 319 (rejecting lessor's argument that the parties intended to create a lease rather than a security interest simply because the agreement: (1) stated that title to the assets would remain "at all times" with the lessor; (2) declared that it was the intent of the parties that the agreement be a lease; and (3)stated that "the relationship between [lessor] and [lessee] shall always and only be that of lessor and lessee"); *see also Dunn Bros.*, 16 B.R. at 45 ("A provision requiring return of the leased property at the end of the term, does not negate the possibility of the agreement being a security agreement.") (citing 1 Anderson on U.C.C. § 1-201:14 (2d ed. 1979)). Rather, "it is the very sense of [the definition of "security interest" contained in § 1-201(37)] that an agreement in terms of lease may hide a secured transaction, so that the bare language does not always suffice to disclose the intention of the parties." *Commercial Credit Equip. Corp.*, 820 S.W.2d at 319 (citing 1 R. Anderson, *Anderson on the Uniform Commercial Code*, § 1-201:256 (3d ed. 1981)).

Accordingly, the Court looks to all of the facts as presented in this case. Having reviewed the totality of the evidence before it, the Court find that the Master Lease and schedules create security agreements despite the language noted above. Specifically, in addition to the fact that CareSouth bargained for the right to purchase the assets for a nominal price at the end of the lease term, the Court notes as persuasive the fact that ePlus, through the terms of the Master Lease, (1) disclaims all warranties, express or implied, including "those of merchantability or fitness for purpose or use, of condition, performance, suitability

or design, or conformity to any law, rule, regulation, agreement or specification, or of infringement of any patent, trade secret, trademark, copyright or other intangible property right," *see* Master Lease at ¶ 6(c); (2) disclaims all liability to Lessee and prohibits abatement "for any loss, claim or damage of any nature caused or alleged to be caused directly, indirectly, incidentally, or consequentially by the Asset(s), any inadequacy thereof, deficiency or defect therein (whether known or unknown by the Lessor), by any incident whatsoever arising in connection therewith, whether in strict liability or otherwise, or in any way related to or arising out of th[e] Master Lease Agreement or Schedule," *see id.*; (3) places upon CareSouth sole responsibility "for the delivery, installation, maintenance and repair of the Asset(s)," *see id.* at ¶ 7(c); (4) requires CareSouth to "pay all license fees, registration fees, assessments, charges and taxes related to the Asset(s)," *see id.* at 9(b); (5) places upon CareSouth "the entire risk of loss with respect to any Asset damage, destruction, loss, theft, or governmental taking, whether partial or complete, for any reason," and further states that "[n]o event of loss shall relieve [CareSouth] of its obligation to pay Rent under any Schedule unless [CareSouth's] obligations, as defined under th[e] Master Lease, have been satisfied," *see id.* at 10(a); (6) requires CareSouth to obtain insurance of the Assets at its own expense, *see id.* at ¶ 11; and (7) included in the Master Lease default provisions that inordinately favor its own interests, *see id.* at ¶14. As other courts have noted, factors such as these indicate that the parties intended to create a security interest. *See Rex Group*, 80 B.R. at 779-80; 4 White & Summers, *Uniform Commercial Code* § 30-3 (4th ed.) (noting that, "[w]hen the term of a lease gets longer and inches toward the full economic life of a commodity, when an option to purchase is granted to the lessee, and when the lessee assumes many of the

risks of ownership – secures for itself most of the benefits or detriments of ownership – a lease looks more and more like a loan and a secured sale in which the attributes of ownership are held not by the lessor (creditor), but by the lessee (buyer-debtor).)[24] In addition, facts such as these often serve as the basis for a court's determination with respect to the parties intent, as decisions regarding intent are often made by reference to such substantive factors and in the absence of any testimony bearing directly on intent. *See* White & Summers at § 30-3 & n.23 (citing cases).

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24. The Court also notes as significant the following observation from White & Summers:

> The central feature of a true lease is the reservation of an economically meaningful interest to the lessor at the end of the lease term. Ordinarily this means two things: (1) at the outset of the lease the parties expect the goods to retain some significant residual value at the end of the lease term; and (2) the lessor retains some entrepreneurial stake (either the possibility of gain or the risk of loss) in the value of the goods at the end of the lease term.

White & Summers at § 30-3 (quoting Huddleson, "Old Wine in New Bottles: UCC Article 2A – Leases", 39 ALA. L. REV. 6125, 625 (1988)). The fact that the parties in this case have engaged in protracted litigation over cubicles and other office equipment they concede have little or no market value dramatically illustrates this point. ePlus retains no "economically meaningful interest" in any of the disputed assets, particularly when compared to their initial value. Accordingly, there can be little doubt that the Master Lease and Schedules, with the possible exception of Schedule 3 (which contains no purchase option), were never intended by the parties to be "true" leases.

Accordingly, having reviewed the facts before it, the Court concludes that the inclusions of such provisions in the Master Lease reflect the intention of the parties to treat this exchange as a secured transaction rather than a common law lease.[25]

Further, the Court rejects ePlus's arguments, advanced both in its papers and at trial, that CareSouth is prohibited from exercising its purchase options by virtue of the fact that it was delinquent both (1) in making its periodic payments during the initial lease term of the various schedules, and (2) in providing notice of its intent to exercise the various purchase options. Such arguments are clearly foreclosed by the Supreme Court's holding in *Garcia Enterprises*. *See Garcia Enterprises*, 253 Va. at 109, 480 S.E.2d at 500 (holding that the creditor was limited to repossessing and selling the secured property in accordance with Va. Code § 8.9-503 and -504 (now repealed) because the debtor's failure to timely exercise its purchase option or tender the $1 purchase price "did not affect [the creditor's] right to receive payment for the [asset]," and therefore "did not constitute a default nor affect [the creditor's] ownership interest in the [asset]").

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25. This conclusion is further supported by the following facts. First, the only provision in the Master Lease which speaks to its character is Paragraph 6(a), which refers to each individual schedule as a "finance lease" as defined by the U.C.C., thereby indicating an intent to create a security agreement. *See* Uniform Commercial Code Comment to Va. Code § 8.2A-103 at ¶ (g) (noting that "the term finance lease has been used to connote different types of lease transactions, including leases that are disguised secured transactions"). Second, the transaction was regarded by EAB as a conditional sale, and was entered into its computer system as such (thereby leading to the issuance of the bill of sale for the assets covered by Schedule 1). (Gambla Dep. at p. 10, 1.7 - p. 11 1.20.)

Appendix B

(2) Schedules 3, 100, 101, 102, 103, and 104

Because it had no legitimate basis for its refusal to honor the purchase options contained in Schedules l and 4, the Court finds that ePlus was in breach of the terms of the Master Lease when it refused to permit CareSouth to exercise the purchase options contained in the remaining Schedules. The Court further concludes that, because the current combined market value of the assets covered by Schedules 100, 101, 102, 103, and 104 amounts to only $6,068, the consideration required under these purchase options also qualifies as "minimal" for the reasons outlined above, and that they therefore constitute security agreements as a matter of law. In the alternative, the Court holds that, for the reasons stated above, the facts of this case give rise to the conclusive presumption that these schedules were intended to create security agreements.

The Court does note, however, that Schedule 3 contains no purchase option. Whether this omission was intentional, or whether it was simply a drafting error as CareSouth claims, is irrelevant in light of the fact that Caresouth failed to bring a cause of action for reformation. The Court therefore finds that CareSouth is without a remedy as to Schedule 3, and that the above analysis does not apply to ePlus's claim for additional rent under Schedule 3.

Rather, in the absence of a purchase option, CareSouth's only legitimate course of action was the timely return of the Schedule 3 assets on or before March 1, 2000. It failed to do so. ePlus is therefore entitled to relief with respect to Schedule 3 in the amount of $1,435.36 per quarter, plus pre-judgment interest.

(3) Conclusion

Accordingly, the Court will enter judgment in favor of CareSouth with respect to Schedules 1, 4, 100, 101, 102, 103, and 104, and in favor of ePlus with respect to Schedule 3. Because the uncontested evidence demonstrates that the assets covered by Schedule 1 have a negative market value, and because the purchase option mandates that the market value at the close of the initial lease period be used to determine the purchase price, the Court will enforce the purchase option and will order that the assets covered by Schedule 1 be sold to CareSouth for $1.

Because of the absence of any purchase option, title to the assets covered by Schedule 3 remains in the hands of ePlus. Although the uncontested evidence demonstrates that the assets covered by Schedule 3 also have a negative value, the Court is powerless, in the absence of a valid purchase option, to direct the parties as to the disposition of these assets.[26]

With respect to Schedule 4, the Court will order ePlus to remit to CareSouth the $20,723.96 collected as holdover rent for July 2000. With respect to the remaining schedules, the Court finds that CareSouth made the following payments after the

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26. The Court rejects CareSouth's argument that EAB is a "merchant" for purposes of Va. Code § 8.2-403, and therefore rejects CareSouth's argument that it was a good faith purchaser for value of the assets covered by Schedule 3. Further, the Court holds that EAB is not responsible for CareSouth's liability with respect to Schedule 3, as it was CareSouth's responsibility to review the terms of its agreements in order to determine whether it had the right to purchase the assets covered by Schedule 3.

conclusion of the initial lease terms of the various schedules: $83,045.76 on Schedule 100; $26,975.69 on Schedule 101; $2,219.40 on Schedule 102; $1,146.58 on Schedule 103; and $2,601.61 on Schedule 104. (JE 48.) The undisputed evidence establishes that the current market value of the assets covered by Schedules 100 through 104 is $6,068.00. Accordingly, the Court will order ePlus to remit to CareSouth $109,921.04, which accounts for the amount CareSouth overpaid on Schedules 100 through 104, less the current market value of the equipment. This amount is to be added to the $20,723.96 discussed above with respect to Schedule 4. In addition, ePlus and EAB are entitled to collect from CareSouth any unpaid late fees which accrued during the initial lease terms of the various schedules. Accordingly, CareSouth will be ordered to pay any reasonable late fees, plus interest, which are a result of its delinquency in making payments during the initial lease terms of the respective schedules.

Therefore, in sum, the Court will order ePlus to remit to CareSouth a total of $130,644.00, plus pre-judgment interest, which represents the amount ePlus wrongfully charged CareSouth in holdover rent on the various schedules, less the purchase price of the assets covered by Schedules 1, 100, 101, 102, 103, and 104 (*i.e.*, $1.00 for the assets covered by Schedule 1, and $6,068.00 for the assets covered by Schedules 100, 101, 102, 103, and 104). CareSouth will also be ordered to pay to ePlus and/or EAB any reasonable late fees incurred during the initial terms of the schedules, plus interest.

With respect to ownership of the assets, CareSouth holds title to those covered by Schedules 1, 100, 101, 102, 103, and 104. ePlus holds title to the assets covered by Schedule 3, and,

at its discretion, may either communicate return instructions to CareSouth or negotiate a purchase price for those assets. CareSouth will be ordered to pay ePlus holdover rent on Schedule 3 in the amount of $1,435.36 per quarter, plus prejudgment interest.

Finally, for the reasons outlined above, the Court holds that the actions of EAB did not contribute in any way to the liability sustained by either ePlus or CareSouth. All claims for relief against EAB will therefore be denied.

C. Virginia Contract Law

Because the conclusions reached above with respect to Article 9 of the U.C.C. resolve all issues currently before the Court, it need not address the additional arguments raised by the parties. However, because the principles of contract law lead the Court to the same conclusion, it provides the following analyses as alternative bases its decision.

As a preliminary matter with respect to the following discussion of the applicable contract principles, the Court concludes that CareSouth was not in default at the time it sought to exercise the purchase options contained in Schedules 1 and 4, as it had cured any potential default by paying all assessed late fees. As it was the custom of the parties to assess late fees, any un-assessed fees cannot serve as the basis for default. *See Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3, 9-11 (4th Cir. 1971); *Piland Corp. v. REA Constr. Co.*, 672 F. Supp. 244, 247 (E.D. Va. 1987) (holding that "[c]ustom and usage is admissible to explain or supplement a contract, and in Virginia, a finding of ambiguity is not necessary for the admission of . . .

the usage of the trade and the parties' course of dealing.") (citation and internal quotations omitted).[27] Further, the Court also concludes that Virginia contract law did not require CareSouth to provide notice of its intent to exercise the purchase options contained in Schedules 102 and 104, as the law does not require a party to a contract to perform a futile act. *See Snead v. Harbaugh*, 241 Va. 524, 526 n.1, 404 S.E.2d 53, 54 n.1 (1991).

(1) Materiality

As an alternative basis for its ruling, the Court finds that any alleged breaches by CareSouth with respect to the timeliness of its payments or notification of its intent to exercise its purchase options were immaterial. As the Supreme Court of Virginia has expressly held, "[a] material breach is a failure to do something that is so fundamental to the contract that the failure to perform that obligation defeats an essential purpose of the contract." *Countryside Orthopaedics v. Peyton*, 261 Va. 142, 154, 541 S.E.2d 279, 285 (2001) (quoting *Horton v. Horton*, 254 Va. 111, 115, 487 S.E.2d 200, 203 (1997)); *see also RW Power Partners v. Virginia Elec. & Power Co.*, 899 F. Supp. 1490, 1496 (E.D. Va. 1995) (holding that "a material breach is one

27. In construing the language of the respective purchase options, the Court holds that options require only that CareSouth not be in default at the time it exercises the options. It does not require that CareSouth have never been in default, as asserted by ePlus. This raises some issue as to whether CareSouth would be liable to ePlus for additional payments incurred with respect to Schedule 100, for which late fees were invoiced but not paid at the time CareSouth sought to exercise its purchase option. However, because of its ruling with respect to Article 9, *supra*, the Court need not address this issue.

that goes 'to the root of the contract.' In other words, a material breach 'deprive[s] the injured party of the benefit that the party justifiably expected from the exchange.'" (quoting *Farnsworth on Contracts*, Material Breach and Suspension, § 8.16)). Such clearly cannot be said of any potential breach by CareSouth which occurred in this case. As the court in *RW Power Partners* explained, although society clearly has an interest in protecting the parties' justified expectations, "'it is not in society's interest to permit a party to abuse this protection by using an insignificant breach as a pretext for avoiding its contractual obligations.'" 899 F. Supp. at 1496 (quoting *Farnsworth on Contracts*, Power to Suspend Performance and Terminate the Contract, § 8.-15).[28]

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28. As the *RW Power Partners* Court notes, the Restatement (Second) of Contracts also offers guidance with respect to the issue of materiality by providing the following five factors for consideration:

> (1) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
>
> (2) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
>
> (3) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
>
> (4) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; [and]

(Cont'd)

ePlus's behavior in this case, as typified by its refusal to allow CareSouth to exercise its purchase options with respect to Schedules 100 through 104 until it rectified the alleged arrears on Schedules 1, 3, and 4, represents the paradigmatic example of such behavior. Indeed, it is difficult to imagine an alleged breach more immaterial than a short delay in the exercise of a market price purchase option for used office equipment with little or no market value, or a similarly short delay in the making of a monthly payment on a long-term lease, particularly when less drastic remedies, such as the imposition of late fees, were available but were not even utilized in every instance. Accordingly, ePlus's attempt to hold CareSouth liable for hundreds of thousands of dollars in additional payments as a result of such trivial breaches must fail.

(Cont'd)

> (5) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

899 F. Supp. at 1496-97 (quoting Restatement of Contracts (Second) § 241).

After carefully considering these factors in light of the facts and circumstances of this case and the evidence before it, the Court finds that Section 241 of the Restatement (Second) of Contracts strongly supports its conclusion that any potential breach by CareSouth was not material, and therefore did not in any way justify (1) ePlus's refusal to honor the purchase options contained in Schedules 1 and 4; or (2) its refusal to allow CareSouth to timely exercise the purchase options contained in Schedules 100 through 104.

Furthermore, the Court notes that ePlus has failed to articulate any way in which it was harmed by CareSouth's delay in providing notice of its intent to exercise the various purchase options. *See, e.g., U Save Foods, Inc. v. Nash-Finch Co.*, 127 F. Supp. 2d 1307, 1314 (D. Kan. 2001) (holding that, under Kansas law, a lessor bears a "high burden" when it "seeks to prevent a lessee from exercising a renewal option after the date specified in the lease, but within the current term of the lease"); *Tritt v. Huffman & Boyle Co.*, 503 N.Y.S.2d 842, 843 (N.Y. App. Div. 1986) (holding that, under New York law, in a situation in which the lessor has failed to demonstrate any prejudice, "[e]quity will intervene to relieve a tenant from the consequences of its negligent or inadvertent failure to give timely notice of its exercise of an option to renew a lease, where the failure to give timely notices does not prejudice the landlord, and the nonrenewal of the lease would result in a forfeiture for the tenant, the gravity of which would be out of proportion to the tenant's fault").

Here, it is virtually inconceivable that ePlus suffered any prejudice whatsoever – let alone any material prejudice – as a result of CareSouth's minor delays in making its monthly payments[29] and delays in notifying it of its intent to exercise its purchase options under Schedules 1 and 4, or in failing to timely terminate Schedule 3. Further, ePlus would have been notified of such intent even earlier had they not misled both CareSouth and EAB in the July 23 Letter. Indeed, in light of the extreme delinquency – if not outright stonewalling – demonstrated by ePlus with regard to CareSouth's repeated requests for buyout figures

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29. This is further evidenced by the fact that the monthly payments were made to ePlus's assignees, rather than ePlus directly, and that neither the assignees nor ePlus bothered to assess late fees on several of the delinquencies.

and/or return instructions under the various schedules, the Court finds that time clearly was not of the essence to ePlus. Rather, the evidence before the Court suggests that ePlus's primary goal in its dealings with CareSouth was to thwart CareSouth's attempts to exercise the various purchase options for which it had negotiated, and from which ePlus stood to gain almost nothing, in order to force CareSouth into retaining possession of the assets beyond the initial lease term so that ePlus could continue to extract additional payments from CareSouth for office equipment that had little or no market value. ePlus's attempt to capitalize on its sharp business practices therefore fails.

(2) Equitable Estoppel

As a second alternative basis for its ruling, the Court holds that ePlus is equitably estopped from recovering in this case.[30]

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30. In arguing against the application of equitable estoppel, ePlus relies heavily on the Supreme Court of Virginia's holding in *Sentara Enterprises Inc. v. CCP Assoc.*, 243 Va. 39, 413 S.E.2d 595 (1992). In light of the Court's ruling with respect to Article 9, *supra*, *Sentara* is clearly inapplicable to the case at bar.

However, even in the absence of the Article 9 discussion, the Court finds that *Sentara* does not govern the outcome of this case. First, *Sentara* deals with options to renew, not purchase options. Second, it requires that the failure to provide notice be "due *solely* to the tenant's negligence, unaccompanied by fraud, accident, mistake or surprise, *and unaffected by the landlord's conduct*." 243 Va. at 44, 413 S.E.2d at 597-98 (emphasis added). The Court cannot find, based on the record before it, that CareSouth's failures to timely provide notice of its intent to exercise its purchase options was "unaffected by the landlord's conduct" as required by *Sentara*.

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That is, under Virginia law, it is no longer necessary for a party to demonstrate actual fraud in order to establish equitable estoppel. Rather, all that is required is a showing that "the person to be estopped has misled another to his prejudice . . . or that the innocent party acted in reliance upon the conduct or misstatement by the person to be estopped. *Nargi v. Camac Corp.*, 820 F. Supp. 253, 256 (W. D. Va. 1992) (quoting *T v. T*, 216 Va. 867, 872-73, 224 S.E.2d at 152). In order to

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Through the issuance of the misleading July 23 Letter, and through its blanket refusal to allow Caresouth to exercise several of the remaining purchase options, ePlus's conduct directly or indirectly affected Caresouth's behavior in exercising its purchase options.

Further, even if CareSouth's tardiness in providing notice of its intent to exercise its purchase options could be attributed solely to its own negligence, the simple fact remains that the July 23 Letter fundamentally altered the contractual relationship between the parties. As stated in paragraph 18 (g) of the Master Lease, "[n]either this Master Lease Agreement nor any Schedule may be altered, modified, terminated, or discharged *except by a writing signed by the party against whom enforcement of such action is sought*" (emphasis added). Having carefully reviewed the July 23 Letter, which was signed by an officer of MLC (the predecessor in interest to ePlus), the Court finds that the letter satisfies this requirement.

Accordingly, the Court finds that the July 23 Letter serves to alter the terms of the Master Lease as it pertains to Schedules 1, 2, 3, and 4, and thereby releases CareSouth from its obligation to provide notice to ePlus of its intent to exercise the purchase options contained in Schedules 1, 2, and 4. In the alternative, the Court finds that the July 23 Letter,. at a minimum, clothed EAB with the apparent authority to waive any defect in notice, which EAB clearly and reasonably chose to do.

demonstrate estoppel under Virginia law, the party seeking it "must demonstrate a representation, reliance, a change of position, and detriment." *Id.*

The Court finds that CareSouth meets these requirements with respect to Schedules 1 and 4, in that: (1) ePlus falsely represented in the July 23 Letter that the assets covered by these schedules had been assigned; and (2) CareSouth relied on this representation to its detriment. The Court therefore finds that ePlus is estopped from suing on the basis of any alleged defect on the part of CareSouth in providing notice of its intent to exercise the purchase options for which it had negotiated.

(3) Prevention of Performance

At the outset of this third alternative basis for its ruling, the Court notes that it is beyond serious debate that a party to a contract cannot endeavor to do everything in its power – by either act or omission – to impede or prevent another party's performance of its contractual obligations, and then turn to a court of law to seek redress for a situation wholly of its own making. *See, e.g., Whitt v. Godwin*, 205 Va. 797, 800, 139 S.E.2d 841, 844 (1965) (holding that "[t]here is an implied condition of every contract that one party will not prevent performance by the other party. Hence if one of the contracting parties prevents the other party from performing under the contract, he cannot prevail in an action for nonperformance of the contract which he himself has brought about"); 17A Am. Jur. 2d *Contracts* § 702 (1991) ("It is an implied condition of every contract that one party will not prevent performance by the other party, and it follows that a contracting party who prevents the other party from performing under the contract cannot urge

or avail himself of the nonperformance which he himself has brought about.") (footnotes omitted). Further, under Virginia law, the prevention of performance need not arise directly from the acts of the promisee, as even indirect causation is sufficient.[31]

Here, the Court finds that ePlus – by both act and omission – directly or indirectly prevented CareSouth from exercising the purchase options for which it had negotiated, and from generally performing its obligations under the Master Lease. Indeed, rather

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31. The Supreme Court of Virginia, in *Boggs v. Duncan*, 202 Va. 877, 882 121 S.E.2d 359, 363 (1961), stated as follows:

> "A plaintiff cannot prevail in an action for non-performance of a contract, for which nonperformance he alone is responsible. If the impossibility of performance arises directly or even indirectly from the acts of the promisee, it is sufficient excuse for nonperformance. This is upon the principle that he who prevents a thing may not avail himself of the nonperformance which he has occasioned."
>
> "Moreover, such prevention is a breach of the contract by the party so preventing performance and renders him liable to pay damages. The party prevented from performing is at liberty to treat the contract as broken and abandon it and recover as damages the profits which he would have received through full performance. In other words, such party may regard it as terminated and demand whatever damages he has sustained thereby."

202 Va. at 882, 121 S.E.2d at 363 (quoting 12 Am. Jur., Contracts, §§ 381 & 386).

than allowing CareSouth to properly exercise the purchase options, the Court finds that ePlus identified alleged breaches of the terms of the Master Lease primarily as a *post hoc* rationalizations for its delinquency in responding to CareSouth's inquiries and other instances of course dealing.

For example, the Master Lease, which was drafted by ePlus, clearly places upon ePlus the obligation of providing return instructions at the close of the lease term. *See* Master Lease ¶ 12 (a) (stating that "[o]n the last day of the Schedule Term, Lessee shall return the Asset(s) to Lessor in good repair, condition and working order, ordinary wear and tear alone expected, *to the location specified by Lessor.*" (emphasis added)). The Court finds this language unambiguous as a matter of law, *see Tuomala v. Regent Univ.*, 252 Va. 368, 374, 477 S.E.2d 501, 505 (1996), but holds in the alternative that, even if it could be said to be ambiguous, it should be construed against ePlus, who was the drafter of the Master Lease. *See Galloway Corp. v. S.B. Ballard Constr. Co.*, 250 Va. 493, 505, 464 S.E.2d 349, 356 (1995) .

Accordingly, the Court finds that it was ePlus's obligation to provide such instructions when requested by CareSouth. ePlus consistently and invariably failed to do so, as nearly all of CareSouth's requests for instructions regarding end of lease options under the various schedules were met with silence. Only after the expiration of the initial Schedule 4 lease term on July 5, 2000, did ePlus bother to respond.

ePlus then sought to profit from these actions by refusing to negotiate with CareSouth on any of the remaining schedules until CareSouth paid the amount ePlus claimed it was owed under Schedules 1, 3, and 4. Put simply, the Court concludes that any non-performance of CareSouth was a direct or indirect result of ePlus's own acts and omissions. Further, ePlus's *post hoc* attempts to justify its stonewalling and inaction by pointing to CareSouth's tardiness in the tendering of some of its payments and notifications fails, as it is unsupported by the record. Rather, a review of the record reveals that the explanations offered by ePlus employees for their actions, both in refusing to respond to communications from CareSouth and in refusing to allow it to exercise its purchase options, are, at various times, confusing, contradictory, and evasive. Indeed, in light of the fact that ePlus employees were seemingly unable to understand the nature and terms of the transaction, and were clearly unable to articulate the interpretation of the terms of the Master Lease and Schedules now advanced by ePlus in this litigation, the Court fails to see how this somewhat tortured interpretation can now be imposed on CareSouth. Put simply, the Court is aware of no doctrine or case which would justify the measures taken by ePlus during the course of its relationship with ePlus. Accordingly, the Court concludes that its attempt to profit therefrom is barred by Virginia law.

IV. Conclusion

For the foregoing reasons, the Court will enter judgment in favor of ePlus with respect to Schedule 3. The Court will further enter judgment in favor of CareSouth with respect to Schedules 1, 4, 100, 101, 102, 103, and 104, and with respect to its counterclaim against ePlus. CareSouth will be required to

pay any outstanding late fees assessed by ePlus or EAB for delinquent payments during the initial lease terms of the various schedules. All claims against EAB will be denied. An appropriate Order shall issue.

June 10th, 2002
Alexandria, Virginia

s/ [illegible]
UNITED STATES DISTRICT COURT
JUDGE

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 01-286-A

EPLUS GROUP, INC.,

Plaintiff,

v.

CARESOUTH HOME HEALTH SERVICES and
EAB LEASING CORP.,

Defendants.

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby ORDERED that:

1) Judgment is entered in favor of Plaintiff ePlus Group, Inc. with respect to Schedule 3;

2) CareSouth shall accordingly pay ePlus $1,435.36 per quarter in holdover rent, plus prejudgment interest, under Schedule 3;

3) ePlus shall retain title to the assets covered by Schedule 3;

4) Judgment is entered in favor of Defendant CareSouth Home Health Services with respect to Schedules 1, 4, 100, 101, 102, 103, and 104;

5) CareSouth shall receive title to the assets covered by Schedules 1, 100, 101, 102, 103, and 104 (the assets covered by Schedule 4 having already been returned and resold);

6) Judgment is entered in favor of CareSouth Home Health Services with respect to its Counterclaim in the amount of $130,644.00, plus prejudgment interest;

7) CareSouth shall pay to ePlus and/or EAB any and all reasonable late fees assessed as a result of late payments under the initial lease terms of the various schedules, plus interest;

8) All claims against Defendant EAB Leasing Corp. are denied; and

9) the Clerk of the Court shall forward copies of this Order and the accompanying Memorandum Opinion to all counsel of record.

This ORDER is FINAL.

June 10th, 2002 s/ [illegible]
Alexandria, Virginia UNITED STATES DISTRICT COURT
JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING DATED MAY 19, 2003

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LEWIS F. POWELL, JR. UNITED STATES COURTHOUSE ANNEX
1100 EAST MAIN STREET, SUITE 501
RICHMOND, VIRGINIA 23219-3517
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PATRICIA S. CONNOR
CLERK

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May 19, 2003

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Appendix C

Re: 02-1709 ePlus Group Inc v. CareSouth Home
CA-01-286-A

02-1746 ePlus Group Inc v. CareSouth Home
CA-01-286-A

Dear Counsel:

Enclosed is a copy of an order filed today in this case.

Yours truly,

PATRICIA S. CONNOR
Clerk

By /s/ Carina Domeika Ida
Deputy Clerk

Enclosure(s)

cc: Elizabeth H. Paret

On Petition for Rehearing En Banc

ePlus Group, Inc.'s petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK

Supreme Court, U.S.
FILED
SEP 2 2 2003
OFFICE OF THE CLERK

(2)

No. 03-278

In the Supreme Court of the United States

ePLUS GROUP, INC.

Petitioner,

v.

CARESOUTH HOME HEALTH SERVICES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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9 pp

QUESTION PRESENTED

Whether an unpublished decision of the Fourth Circuit, affirming an unpublished opinion from the United States District Court for the Eastern District of Virginia, and containing a factual discussion but no legal analysis, creates such a compelling conflict with a decision of another United States court of appeal so as to warrant review by this Court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent respectfully submits this Corporate Disclosure Statement.

Respondent CareSouth Home Health Services, Inc. is a wholly owned subsidiary of CareSouth Health System, Inc.

TABLE OF CONTENTS

Question Presented i

Corporate Disclosure Statement ii

Table of Contents iii

Table of Authorities iv

Counter-Statement of the Case 1

Reasons for Denying the Writ 2

Conclusion 4

TABLE OF AUTHORITIES

Cases: **Page**

Hogan v. Carter, 85 F.3d 1113 (4th Cir. 1996) 2

Jefferson Fourteenth Ass. v. Wometco de Puerto Rico, 695 F.2d 524 (11th Cir. 1983) 3

Nagler v. Admiral Corp., 248 F.2d 319 (2nd Cir. 1957) 3

Ricketts v. Midwest Nat'l Bank, 874 F.2d 1177 (7th Cir. 1989) 3

Rules:

Rule 15.2 of the Rules of the Supreme Court of the United States 1

Rule 36(c) of the Fourth Circuit Court of Appeals 2

FED. R. CIV. P. Rule 54(c) 3

Other Authorities:

R. Stern, E. Gressman, S. Shapiro, K. Geller, Supreme Court Practice 225 (8th ed. 2002) 2

COUNTER-STATEMENT OF THE CASE

A review of the trial court's Memorandum Opinion reveals that the trial court was presented with a factually intensive dispute between the parties. However, the dispute was largely the consequence of an undisputed timeline of events, not the underlying facts themselves. The parties submitted the case on a written record for decision by the district court. The factual statement contained in the Petition for Writ of Certiorari of ePlus Group, Inc. (hereinafter "ePlus") contains an oversimplification of the history and nature of the relationship of the parties. The Memorandum Opinion of the district court sets forth a more comprehensive background.

In accordance with Rule 15.2 of the Rules of the Supreme Court of the United States, CareSouth notes herein certain misstatements contained in ePlus' Petition. First, Petitioner asserts the "basis of [the trial judge's] decision was that he recharacterized the leases as disguised security interests." Petition p. 3. Although this finding was admittedly one basis for the trial court's decision, the Memorandum Opinion also contains three alternate, independent bases under Virginia law supporting the ruling in favor of CareSouth. Second, ePlus suggests the trial court did not allow ePlus to present evidence on the issue of disguised security leases. Petition, p. 3. In fact, the parties agreed to submit the case to the district court judge for a decision on a stipulated record, including depositions and affidavits. ePlus waived its right to present further evidence through live testimony and apparently failed to present through stipulations or depositional testimony the facts that it, in hindsight, believes would have helped its case.

REASONS FOR DENYING THE WRIT

ePlus has failed to offer a compelling reason to grant the Petition for Writ of Certiorari. ePlus argues the Petition should be granted to resolve a conflict between the Fourth Circuit's decision and opinions of the Courts of Appeal for the Seventh and Eleventh Circuits. ePlus concedes it must demonstrate "a real or 'intolerable' conflict [between the decision sought to be reviewed and the decision of another court of appeals], not merely an inconsistency in dicta or in the generable principles criticized." Petition, p. 4, *quoting* R. Stern, E. Gressman, S. Shapiro, K. Geller, Supreme Court Practice 225 (8th ed. 2002). Yet, ePlus recognizes the Fourth Circuit's unpublished decision herein did not address the due process issue, even in *dicta*, that ePlus now maintains is in intolerable conflict with other circuit court decisions. [1] Petition, p. 5. Rather, that opinion contains a factual recitation with a two-line finding of no reversible error. Moreover, because both the Fourth Circuit's and the trial court's decisions were unpublished,[2] they hold no precedential value, Hogan v. Carter, 85 F.3d 1113, 1118 (4th Cir. 1996), and any citation thereto is disfavored by Fourth Circuit Court Rules. 4TH CIR. R. 36(c). It is apparent that ePlus is not concerned about reversing a "broad precedent" which is alleged to support the denial of due process, see Petition, p. 5, but rather it is merely interested in overturning an adverse judgment. There is simply no conflict, much less "intolerable conflict," among the circuit courts.

---

[1] The trial court's opinion does not address ePlus' due process argument either.

[2] Contrary to ePlus' suggestion, Petition, p.5, the trial court's decision does not appear in a Westlaw search of Fourth Circuit cases for "CareSouth" or "ePlus."

The circumstances underlying the decisions that are alleged by ePlus to be in conflict with the Fourth Circuit's opinion are easily distinguished from what occurred in this case. See Petition, p. 4. Ricketts v. Midwest Nat'l Bank, 874 F.2d 1177 (7th Cir. 1989) and Jefferson Fourteenth Ass. v. Wometco de Puerto Rico, 695 F.2d 524 (11th Cir. 1983) dealt with district courts' *sua sponte* dismissals of complaints with no advance notice or opportunity to be heard on the dismissals. In contrast, ePlus complains of no fair notice after the case was submitted to the trial court, sitting as factfinder, for a decision on the merits. Both parties waived their right to present live testimony at a trial in favor of a stipulated record. Each bore the risk the record would not be complete as presented when they knowingly and voluntarily agreed to this cost-saving measure. It is counsel's duty to alert the Court to controlling law, but where as here, counsel failed to apply law to facts in its arguments, the Court still has a duty to do so. See Nagler v. Admiral Corp., 248 F.2d 319, 328 (2nd Cir. 1957) ("For it is clear law that it is the duty of the court to grant the relief which the facts before it require; the legal theories which the parties may have suggested or relied on may be of help to the court, but do not control."); see also, FED. R. CIV. P. Rule 54(c) ("every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.") The circumstances presented here are vastly different than those underlying the circuit court opinions asserted to be in conflict.

ePlus' Petition should also be denied because it fails to address all the arguments supporting the trial court's ruling in favor of CareSouth. The trial court's ruling also offered three independent, alternate grounds for ruling in favor of CareSouth. ePlus does not seek review of these findings and, therefore, even if ePlus were to succeed in eventually

overturning the disguised lease portion of the trial court's decision, the ultimate result would remain the same.

CONCLUSION

For these reasons, the Petition should be denied.

This 22nd day of September, 2003.

RESPECTFULLY SUBMITTED,

PURSLEY LOWERY MEEKS LLP

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